UNITED STATES GOVERNMENT
National Labor Relations Board

RELEASE

Memorandum A.D.02045

DATE January 30, 1987

TO Michael Dunn, Regional Director
Region 16

FROM Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT

Motor Expressmen's Union
(Mistletoe Express Service)
Case 16-CB-2799

Mistletoe Express Service
Case 16-CA-12860

Fair Rep. Chron.
512-5066-1400
512-5084-5033
518-4030-9000
530-6001-5000
536-2570
536-2581-0180
536-2581-3370
548-6030-3300
554-1467-3033
625-4417-8400
650-5588

These cases were submitted for advice on the following issues: (1) whether the Employer violated Section 8(a)(2) and the Union Section 8(b)(1)(A) of the Act by entering into a modification of the parties' collective-bargaining agreement whereby the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee and whereby owner-operators of trucks would be included in the bargaining unit; (2) whether the Employer violated Section 8(a)(3) by laying off bargaining unit employees and replacing them with casual employees, and the Union Section 8(b)(2) by not enforcing contractual limitations on the use of casual employees; and (3) whether the Employer violated Section 8(a)(5) and the Union Section 8(b)(3) by negotiating the above-mentioned modifications to the parties' contract.

FACTS

Mistletoe Express Service (the Employer) operates as a regional common carrier from its 19 terminals located in Oklahoma, Texas, Arkansas, Kansas and Missouri. The Motormen's Express Union (the Union) is an independent union, voluntarily recognized by the Employer in about 1940, which represents only the Employer's employees in a bargaining unit comprised of the Employer's full time drivers, dockmen and garage mechanics. The parties' current collective-bargaining agreement runs from March 1, 1985 until March 1, 1987.

Pursuant to the Employer's request for economic concessions from the Union because of the Employer's financial difficulties, the Union agreed to reopen the contract in March 1986 1/ and the parties bargained and reached agreement on contract modifications calling for across-the-board wage reductions. The parties reached agreement on further modifications of the contract on July 3 and July 16. The July 16 modifications, which took effect on July 21, included the addition to Section 24 of the contract, entitled "Casuals," of a provision stating that the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee. 2/ Section 27 of the contract, entitled "Job Descriptions," was also modified to include "contract lease operator drivers," i.e., drivers who own and operate their own trucks, in the bargaining unit. 3/ However, as a result of the charges filed in the instant cases, the parties have agreed not to apply the contract modifications concerning casual employees and owner-operators until the issues presented in this case are resolved.

On September 10, Charging Party Michael Reynolds and a number of other employees were laid off, assertedly because the Employer's business volume had declined. However, the Employer admits that casual employees were used as replacements for the laid-off employees and that the Employer's use of casuals increased greatly after the layoffs. On September 18, Charging Party Reynolds filed a grievance over his layoff and the Employer's use of casuals. On September 24, after Reynolds had filed the instant Board charges, the Union's president told

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1/ All dates hereinafter refer to 1986 unless otherwise indicated.

2/ Section 24 of the contract provides that casual employees may be utilized for no more than 30 hours a week, and only to relieve "peak work loads." The use of a casual employee for the maximum number of hours under the contract would thus result in the Employer's payment to the Union of a fee of $15.00. Typical weekly dues paid to the Union by a dockworker amount to $4.03.

3/ Section 10 of the parties' contract allows the Employer to contract out work as it deems necessary. The Employer utilizes contract lease operator drivers on a frequent basis in various locations. The Region has concluded that these owner-operators are independent contractors.

Reynolds that he could prove nothing and that Reynolds was "biting the hand that fed him." The grievance was denied by the Employer on October 10, and the Union decided not to take it to arbitration.

ACTION

We conclude that a complaint should issue, absent settlement, alleging that: (1) the Employer and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively, by entering into a contract modification whereby the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee; (2) the Employer violated Section 8(a)(3) and (1) by laying off unit employees and replacing them with casual employees; (3) the Union violated Section 8(b)(1)(A) by failing to enforce contractual provisions restricting the use of casual employees; and (4) the Union violated Section 8(b)(2) (in addition to 8(b)(1)(A)) by refusing to process Charging Party Reynolds' grievance as to his layoff and as to the Employer's use of casuals. We also conclude that the allegations that the Employer and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively, by entering into a contract modification whereby owner-operators would be included in the bargaining unit, and the allegations that the Employer and the Union violated Section 8(a)(5) and Section 8(b)(3), respectively, by negotiating the contractual modifications pertaining to the 50-cent fee and the inclusion of the owner-operators in the unit, should be dismissed, absent withdrawal.

I. The Employer's agreement to pay the Union a fee of 50 cents an hour for each hour worked by a casual employee.

Initially, we note that while Section 302 of the Act prohibits an employer from paying or agreeing to pay money to a labor organization representing its employees, a violation of Section 302 does not constitute an unfair labor practice and is not even to be considered in determining whether there is a Section 8 violation. 4/ Independent of Section 302, the parties' agreement on July 16 that the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee is clearly violative of Sections 8(a)(2) and 8(b)(1)(A).

4/ Section 302 is enforced by the Department of Justice. See Salant & Salant, Inc., 88 NLRB 816 (1950); Baggett Industrial Constructors, 219 NLRB 171 (1975).

In Jackson Engineering Co., 265 NLRB 1688 (1982), enf. sub. nom. Local 1814, Longshoremen's Union v. NLRB, 735 F.2d 1384 (D.C. Cir. 1984), the Board found violations of Section 8(a)(2) and 8(b)(1)(A) where an employer made concealed cash payments to a union equaling 10 per cent of the business referred to it by union officials. 5/ Furthermore, the mere agreement to make such payments is violative of the Act. 6/ We therefore conclude that the Employer violated Section 8(a)(2) and the Union Section 8(b)(1)(A) by modifying their contract to include a provision that the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee.

II. The inclusion of owner-operators in the bargaining unit.

The July 16 modifications also provided for the inclusion of owner-operators in the bargaining unit. While, as the Region notes, it is clear that the owner-operators, because they are Section 2(3) independent contractors, do not share a "community of interest" with the unit employees, the Board has concluded that where it is not being asked to define a bargaining unit, direct an election or certify election results, it is not necessary to decide whether the unit is appropriate. Thus, in Cardox Div. of Chemetron Corp., 258 NLRB 1202 (1981), enf. denied 699 F.2d 148 (3d Cir. 1983), the Board found that where an employer voluntarily recognized and bargained with a union as the collective-bargaining representative of a unit composed of two of the employer's four field service representatives, the employer could not subsequently argue that the unit was inappropriate on "community of interest" grounds. In the instant case, the Employer voluntarily recognized the Union as the collective-bargaining representative of the Employer's drivers, dockmen and mechanics and the parties mutually agreed to include the owner-operators in the bargaining unit. In Arizona Electric Power Corp., 250 NLRB 1132 (1980), the Board held that where supervisors had not been included in a certified unit, but were subsequently included in the unit by agreement of the parties in

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5/ See also Sweater Bee By Banff, Ltd., 197 NLRB 805 (1972); Sportspal, Inc., 214 NLRB 917 (1974); Guadalupe Carrot Packers d/b/a Romar Carrot, Co., 228 NLRB 369 (1977).

6/ Cf. Sportspal, Inc., supra, in which the employer was found to have violated Section 8(a)(2) by promising to pay the attorneys' fees incurred by a company union in preparing for contract negotiations.

collective-bargaining negotiations, the employer could not withdraw recognition and unilaterally modify the scope of the unit during the life of the contract. 7/ Implicit in the Board's decision was the conclusion that the parties' agreement to include supervisors in the unit was not itself a violation or improper and thus did not constitute a defense to a Section 8(a)(5) charge. Here, by analogy, it was not improper for the parties to agree in negotiations to include in the unit independent contractors who, like supervisors, are not employees under the Act.

Furthermore, we note that the parties' agreement to include owner-operators in the bargaining unit did not have an adverse impact on unit employees. Thus, there is no indication that the Employer increased its use of owner-operators subsequent to their inclusion in the unit or that the layoff of unit employees was a result of this contract modification. Indeed, the inclusion of owner-operators in the unit strengthened it by increasing the number of employees in the unit. Thus, it cannot be said that the Union breached its duty of fair representation when it agreed to include the owner-operators in the unit. 8/ Accordingly in this respect, the Union did not violate Section 8(b)(1)(A).

III. The layoff of unit employees.

We conclude that the Employer violated Section 8(a)(3) by laying off unit employees and replacing them with casual employees and that the Union breached its duty of fair representation by not enforcing contractual restrictions on the use of casual employees, thereby violating Section 8(b)(1)(A) and 8(b)(2).

As the exclusive bargaining representative, a union has the "statutory obligation to serve the interests of all members

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7/ See also, N.Y. Times Co., 270 NLRB 1267 (1984); National Gypsum Co., 220 NLRB 551 (1975).

8/ In Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953), the Supreme Court observed that a union has wide discretion in negotiations to make such concessions and accept such advantages as, in light of all relevant considerations, it believes will best serve the interests of the parties represented.

without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). 9/ In Miranda Fuel Co., Inc., 140 NLRB 181 (1962), rev'd. 326 F.2d 172 (2d Cir. 1963), the Board found that a union breached its duty of fair representation to an individual employee by causing the employer to reduce the seniority status of that employee for a reason unauthorized under the parties' contract. The Board accordingly found that the union had violated Section 8(b)(1)(A) and 8(b)(2) by its conduct and that the employer, by acceding to the union's demand, had violated Section 8(a)(3). Here, the Employer admits that its use of casual employees increased after it laid off unit employees. It is also clear that the Union was not enforcing the contractual limitations on the use of casual employees contained in Section 24 of the parties' contract, i.e., that casuals would only be utilized during "peak work loads" and that casuals would not be used to defeat other sections of the agreement (such as seniority, call back, wage classification and overtime pay). We further note that the Union economically benefits by the Employer's use of casual employees, rather than unit employees, as the Union receives 50 cents for every hour worked by a casual employee, but receives only approximately 10 cents an hour in dues from a unit employee. Accordingly, we conclude that the Union's motivation for not enforcing the contractual limitations on the use of casuals was the financial gain it received from the Employer's use of casuals and that, as the Union's acquiescence to the Employer's conduct resulted in the layoff of unit employees, the Union breached its duty of fair representation to unit employees and violated Section 8(b)(1)(A). Furthermore, the Union's refusing to further process Charging Party Reynolds' grievance concerning his layoff and the Employer's use of casuals was based on the unlawful motivation discussed above. 10/ The Union thus caused or attempted to

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9/ See also, Williams Sheet Metal Co., 201 NLRB 1050, 1056 (1973); "Section 8(b)(1)(A) cases involving a Union's Duty of Fair Representation," General Counsel's Memorandum 79-55, dated July 9, 1979.

10/ See Hughes Tool Company, 147 NLRB 1573, 1574, 1605; Cf. Owens Illinois, Inc., 210 NLRB 943, 944, enfd. 520 F.2d 693 (6th Cir. 1975), and Owens Illinois, Inc., 240 NLRB 324, 325. We note that the Region has concluded that the Union's refusal to take Reynolds' grievance to arbitration itself violated

cause the Employer to discriminate against unit employees, i.e., Reynolds and the others who were in effect replaced by casuals. Thus, the Union also violated Section 8(b)(2) by this latter conduct.

Moreover, we note that under the parties' contract, only full-time employees receive such benefits as a noncontributory pension and sickpay. Thus, assuming that the unit employees' wages and benefits together were greater than the costs associated with using casual employees (including the 50 cent per hour payment to the Union), 11/ it was also to the Employer's economic advantage to utilize casual employees, rather than unit employees. We therefore conclude that the Employer's layoff of unit employees violated Section 8(a)(3). 12/

IV. Bad-faith bargaining.

We conclude that the parties' negotiation of an agreement to include owner-operators in the bargaining unit and the parties' agreement that the Employer would pay the Union 50 cents an hour for each hour worked by a casual employee did not constitute bad-faith bargaining violative of Section 8(a)(5) and Section 8(b)(3).

Initially, we note that the Section 8(a)(5) and Section 8(b)(3) charges were filed by an individual. Although the Board will consider the merits of an 8(a)(5) charge filed by individuals rather than by a union, 13/ Advice has previously taken the position that, as the gravamen of such a charge is an employer's alleged failure to fulfill its bargaining obligation to a union, the individual's charge will be deemed meritless if the union's own conduct would preclude the finding of a

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Section 8(b)(1)(A), and is not submitting that issue to Advice.

11/ [redacted]

12/ See, e.g., Mar-Kay Cartage, Inc., 277 NLRB No. 152 (1985).

13/ See, e.g., Vee Cee Provisions, Inc., 256 NLRB 758, n. 1 (1981)

Section 8(a)(5) violation had the union filed the charge. 14/ Accordingly, where a union has acquiesced in or agreed to the conduct alleged to be violative of Section 8(a)(5), and there is no contention that the union has breached its duty of fair representation in doing so, the employer's conduct will not be deemed violative of the Act, no matter who files the charge.

Next, we note that the Union did not object in negotiations to a proposal to include the owner-operators in the unit and that, as discussed above, in Section II, the Union did not breach its duty of fair representation by agreeing to the provision. Thus, consistent with the above-cited Advice Memoranda, the Section 8(a)(5) charge, as it pertains to this allegation, should be dismissed, absent withdrawal. As there is no evidence that the Employer was forced by the Union to agree to the inclusion of the owner-operators in the unit, the Section 8(b)(3) charge, as it pertains to this allegation, should also be dismissed, absent withdrawal.

Concerning the Employer's agreement in negotiations to pay the Union the 50 cent fee for the use of casual employees, we note that both parties agreed to such a provision. Section 8(d) of the Act states that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to ...confer in good faith with respect to ...the negotiation of an agreement."(emphasis added). Thus, the duty to bargain in good faith under both Sections 8(a)(5) and 8(b)(3) is an obligation mutually owed by the two parties to the relationship, rather than a duty owed to the employees affected by the bargaining process. Violations of the union's duty towards the employees it represents are unlawful under Section 8(b)(1)(A), not under Section 8(b)(3). Here, it is clear that the provision requiring the Employer to pay the Union 50 cents for each hour worked by a casual employee is violative of Section 8(a)(2) and Section 8(b)(1)(A). However, it cannot be said that one party insisted to impasse in bargaining on

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14/ See, e.g., George E. Behm & Sons, Inc., Case 9-CA-22767, Advice Memorandum dated July 31, 1986; International Brotherhood of Teamsters (J.A. Jones Construction Services), Cases 19-CB-5386, et al., Advice Memorandum dated December 13, 1985; Rockford Blacktop Co.,Cases 33-CA-7030-1,-6, Advice Memorandum dated February 13, 1985, and cases cited therein at p. 4, n. 6.

including an illegal provision in the contract.15/ Rather, each party agreed, without any coercion from the other party, to the illegal provision. Finally, our research disclosed no cases in which the agreement of the parties to an illegal contract provision was violative of Sections 8(a)(5) and 8(b)(3), absent other indicia of bad faith bargaining.16/ In these circumstances, we conclude that the Employer and the Union did not engage in conduct violative of Section 8(a)(5) and Section 8(b)(3), respectively, by agreeing in negotiations to the 50-cent payment provision.

V. Remedy.

We conclude that the Region should seek a remedy in this case similar to that found appropriate by the Board in Jackson Engineering Co., supra, at 1689. Thus, the Region should seek an order requiring that: (1) the Employer withdraw and withhold all recognition from the Union as the collective-bargaining representative of the Employer's employees, unless and until the Union has been certified by the Board as the exclusive representative of the employees; 17/ (2) the Employer and the Union cease giving effect to the parties' collective-bargaining agreement, including its modifications, and any supplement or

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15/ See, e.g., Plumbers, Local 141 (International Paper Co., Southern Kraft Div.), 252 NLRB 1299 (1980); Meat Cutters Local 421 (Great Atlantic & Pacific Tea Co.), 81 NLRB 1052 (1949); National Maritime Union (Texas Co.), 78 NLRB 971 (1948), enf'd., 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950). Cf. NLRB v. Borg-Warner Corp., 356 U.S. 342, 360 (1958) (concurring opinion of Justice Harlan, in which he said that "[o]f course an employer or a union cannot insist upon a clause which would be illegal under the Act's provisions.").

16/ Indeed, our research disclosed no cases in which the mere proposal of an illegal subject of bargaining was violative of 8(a)(5) or 8(b)(3).

17/ "[I]n the case of the assisted but undominated union, the Board has consistently directed the employer to withhold recognition from the assisted union until the union receives a Board certification." NLRB v. District 50, UMW, 355 U.S. 453, 459 (1958).

renewal thereof, unless the Union is certified by the Board; 18/ and (3) the Employer and the Union, jointly and severally, reimburse all present and former employees, except those who joined the Union or signed authorization cards prior to the effective date of the parties' illegal provision, i.e., July 21, for moneys paid by them or withheld from them on or after July 21 for Union dues or other obligations of membership in the Union. 19/ In addition to the remedy found appropriate by the Board in Jackson Engineering Co., supra, the Region should also seek an order requiring that: (1) the Employer offer reinstatement to all discriminatorily laidoff employees; and (2) the Employer and the Union, jointly and severally, reimburse discriminatorily laidoff employees for any loss of earnings they may have sustained as a result of the discrimination against them. 20/

In sum, a complaint should issue, absent settlement, alleging that: (1) the Employer and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively, by entering into a contract modification whereby the Employer would pay the Union a fee of 50 cents an hour for each hour worked by a casual employee; (2) the Employer violated Section 8(a)(3) by laying off unit employees and replacing them with casual employees; (3) the Union violated Section 8(b)(1)(A) by failing to enforce contractual provisions restricting the use of casual employees, which resulted in the layoff of unit employees, and (4) the Union violated Section 8(b)(2) (in addition to 8(b)(1)(A)) by refusing to process Charging Party Reynolds' grievance as to his layoff and as to the Employer's use of casuals. The allegations that the Employer and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively, by entering into a contract modification whereby owner-operators would be included in the bargaining unit, and the allegations that the Employer and the Union violated Section 8(a)(5) and Section 8(b)(3), respectively,

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18/ As the Board noted in Jackson Engineering Co., supra, at 1689, citing Sweater Bee By Banff, Ltd., supra, nothing in the order should require the Employer to vary or abandon the substantive terms and conditions of employment contained in the contract.

19/ See also, James Nederlander d/b/a Ned West, Inc., d/b/a Pacific Amphitheatre, 276 NLRB No. 8, ALJD at 38 (1985).

20/ See Niagara Machine & Tool Works, 267 NLRB 661, 663 (1983); H. H. Robertson Co., 263 NLRB 1344, 1366 (1982).

by negotiating the contractual modifications pertaining to the 50-cent fee and the inclusion of the owner-operators in the unit, should be dismissed, absent withdrawal.

H.J.D.